Supreme Court, U.S.
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No. 04-884

In The
Supreme Court of the United States

LOTTIE MILLER,

Petitioner,

v.

FIRSTAR BANK, N.A.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Should this Court deny certiorari when there is no conflict between the circuits that would warrant review, the petition raises no important federal question and the petition would require this court to make a fact-specific determination regarding the sufficiency of the evidence?

PARTIES TO THE PROCEEDING/CORPORATE DISCLOSURE STATEMENT

Respondent Firstar Bank, N.A. is now U.S. Bank National Association, whose stock is owned by U.S. Bancorp.

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STATEMENT OF THE CASE

Petitioner Lottie Miller filed this lawsuit on January 24, 2000 against Firstar Corporation, n/k/a U.S. Bancorp and Respondent Firstar Bank, N.A., n/k/a U.S. Bank National Association ("Firstar" or the "Bank"). Petitioner alleged that one of Respondent's predecessors, Great Financial Bank, discriminated against her because of her race and gender in violation of Title VII of the Civil Rights Act of 1964 when it transferred her from branch manager to relief branch manager in 1996.

The District Court granted summary judgment in favor of both Firstar and Firstar Corporation on Petitioner's claims, concluding that Petitioner had not established a prima facie case because she had not established that she was qualified for the position. *Miller v. Firstar Bank, N.A.*, Case No. 4:00CV-14-5 (W.D. Ky. Jan. 29, 2002) (Petition p. 21a). Petitioner filed a Notice of Appeal with respect to the claims against Firstar arguing that under recent Sixth Circuit law, an employer's legitimate reason should not be considered at the prima facie stage to determine if an employee was qualified. The United States Court of Appeals for the Sixth Circuit, in a 3-0 opinion, affirmed the District Court's Order in this case on September 1, 2004, determining that regardless of whether Petitioner could establish a prima facie stage, there was insufficient evidence of pretext and no reasonable jury could conclude that Petitioner's race or sex played a role in the Bank's decision to move her to a different position. *Miller v. Firstar Bank, N.A.*, 111 Fed. Appx. 796, 2004 U.S. App. LEXIS 18967 (6th Cir. 2004) (Petition p. 2a). Petitioner filed a petition for rehearing, which the Court of Appeals denied on September 27, 2004.

Petitioner then filed this petition for certiorari asking this Court to review whether she had produced sufficient evidence of pretext, contrary to the Sixth Circuit's determination. The Sixth Circuit's fact specific determination that Petitioner's "evidence" was insufficient does not present any issues warranting the Court's review.

STATEMENT OF THE FACTS

Respondent Firstar Bank, N.A. was a national bank, headquartered in Milwaukee, Wisconsin, with full-service branches in Ohio, Wisconsin, Missouri, Kansas, Kentucky, Indiana, Illinois, Iowa, Minnesota, Tennessee, Arkansas, and Arizona. It was the product of a 1998 merger between Star Bank, N.A. and Firstar Bank, N.A. and a 1999 merger with Mercantile Bank, N.A. of St. Louis, Missouri. Firstar Bank, N.A. is now known as U.S. Bank National Association. In January, 1998, before the Star Bank/ Firstar Bank merger, Star Bank acquired Great Financial Bank, a savings bank headquartered in Louisville, Kentucky. Petitioner's allegations relate to events that allegedly occurred when she was employed by Great Financial Bank.

Lincoln Federal Savings and Loan Association, a predecessor to Great Financial Bank, hired Petitioner for the position of Teller in July, 1982. Over the years Petitioner held various positions with Great Financial Bank, including teller, savings counselor, and head teller. In May, 1993, Great Financial merged with Cardinal Federal and Dean Rodney, a Cardinal Federal Vice President, became Executive Vice President, responsible for retail branches in the Owensboro, Kentucky area. Around this time,

Petitioner was offered and accepted the position of branch manager at Great Financial Bank's Carter Road Branch. Petitioner assumed this position, in which she reported to Rodney, on June 1, 1993.

When Petitioner first became a branch manager, Bank employees had traditional banking duties, often acting as "order takers," and functioning based upon customer-driven requests for services – accepting deposits and opening accounts at the customer's request. At that time, the Bank was not making a serious, focused effort to target customer needs and actively sell the Bank's services. Branch managers were generally responsible for the daily operation of the branch.

This changed when Jack Shipman became President of Great Financial Bank in 1994. Shipman introduced a new sales culture that required all Bank employees to actively market the Bank's products. All branch employees – from tellers to branch managers – were now expected to target customer needs and promote products in which the customer might be interested. All employees had personal sales goals they were expected to meet, and the branches had goals (based upon past performance) that each branch was expected to meet.

Branch managers had new responsibilities for developing new customers and expanding the branch's customer base. In addition to the branch manager's traditional responsibility for branch operations and management of employees, branch managers were now also responsible for personal goals, such as making a set number of external sales calls to local businesses each month, and for the branch's overall performance, including, but not limited to, equity and installment loans generated, checking accounts

opened, credit insurance policies sold, and branch cross sell ratios (the average number of products sold to each customer). To generate new business, branch managers were expected to be active in the business community through active participation in civic and social activities, in addition to their responsibilities at the branch.

To facilitate the implementation of the new sales culture, Shipman created a new position, known as sales manager, to oversee sales development in the branches. As the sales culture became increasingly important, this position became more and more important, and branch managers ultimately reported directly to the sales manager with regard to sales issues. Mark Sims filled this position in the Owensboro region where Miller's branch was located.

Initially, some employees resisted the change from a traditional banking role to the new sales culture. Petitioner, in particular, had problems with the new culture and was slow to adjust and hesitant to make sales calls. The Bank made efforts to assist Petitioner in adjusting to the new sales culture. The Bank provided her, and other employees, with professional sales training, which Petitioner attended and found to be a good program. Dean Rodney, Petitioner's manager, also suggested Petitioner go out on sales calls with another employee so that Petitioner could watch someone else and become more comfortable with the process. Petitioner subsequently went out on calls with Pam Hughes, a financial service representative, and found the experience to be helpful.

However, by June, 1995, despite the Bank's assistance, Petitioner still was not adapting fully to the new sales culture, and she was not making the required number of

sales calls. On June 16, 1995, Rodney and Mark Sims counseled Petitioner on her failure to make sales calls. Rodney emphasized to Petitioner that sales calls were a requirement for branch managers and that she must maintain the required number of calls, or changes would have to be made to her position with the Bank. Petitioner indicated she understood.

In August 1995 Petitioner's branch performed last in the state in cross-selling. Rodney addressed his concerns about the branch's performance with Petitioner and Lisa Hartz, the head teller at Carter Road, in a telephone call on August 22, 1995. During this call, Petitioner admitted her lack of success in sales, stating that she was unable even to give away free products, such as debit cards. To help the situation and improve the branch's performance, Rodney suggested that Petitioner and Hartz meet with more successful managers to get ideas for improving their cross-selling numbers. Rodney also warned Petitioner and Hartz that if they did not improve, personnel changes would have to be made at the Carter Road branch.

Petitioner continued to have difficulty with sales calls, despite Rodney's efforts to assist her. For example, Petitioner's reports showed calls that did not meet the Bank's standards for acceptable calls. Specifically, Petitioner was calling on receptionists and non-decision-makers, instead of managers and others authorized to give the Bank business. She also was making all of her monthly calls in one or two days at the end of the month, instead of spreading the calls throughout the month, which would have given her more time to spend on each call. Petitioner acknowledged that this was not the proper way to make sales calls, and that it was possible for her to spread her

calls out over the month. On October 3, 1995, Mark Sims counseled Petitioner on this issue.

Petitioner was hesitant to adapt to other new innovations as well. In November, 1995, she was hesitant to obtain training on the new computer program for processing loans. When she finally had the training she did not use the program.

In November, 1995, Rodney and Sims evaluated Petitioner and noted that Petitioner was "slow to adapt to sales culture," "seems very uncomfortable with sales," "needs a more pro-active approach with her staff to receive better results on goals," and was "still very uncomfortable with sales." With regard to her overall management skills, Rodney and Sims noted:

> When the new sales culture was implemented in the branch, the staff responded with improved numbers; however, overall, the goals and objectives have not been met, in part, due to the slow nature of accepting the sales environment and lack of an ongoing plan to increase revenue at the branch.
>
> The creativity innovation process has not been developed, since the focus has been on carrying out the basic requirements of the day to day activity of the branch.
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> . . .
>
> The team concept for high performance is not fully implemented at Carter Road. There is a perceived need to foster a better effort and team work. With the high expectations set for this office compared to 95 results, there is a need to receive more from the staff. . . . Lottie['s] "style"

> with sales gives the impression of being uncomfortable.

Petitioner admitted that many of these comments were justified.

For 1996, the Western Kentucky Region, the region overseen by Rodney, was given an aggressive business plan. There was greater pressure on all employees – from Rodney down to bank tellers – to market products and meet sales performance expectations. Rodney felt particular pressure from upper management, including Shipman, to improve the Carter Road Branch's performance.

However, despite Rodney's and Sims's efforts to improve Petitioner's performance, Petitioner continued to struggle to keep up with both her sales and managerial responsibilities. Petitioner continued to make eight to nine sales calls in one day instead of spreading them throughout the month, despite being warned that Rodney and Sims did not believe that she could make so many quality sales calls in one day.[1]

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[1] As the Sixth Circuit correctly noted, Petitioner's unsupported assertions that she was making effective sales calls are not only not supported by the record, but are directly contradicted. As the Sixth Circuit noted, Petitioner's own belief that she was effective is not probative in light of the fact that she had zero sales. (Petition, p. 13a, fn. 7) In addition, Petitioner's Petition claims that Dean Rodney stated in his affidavit that Petitioner "was last counseled on sales calls on October 3, 1995." (Petition, p. 12) The affidavit does not characterize this counseling as the *last* time she was counseled on sales calls. In fact, Mark Sims counseled her on sales calls in February, 1996 and Petitioner's 1996 evaluation noted she "has made sales calls this yr. – however, appears to be a need for more quality in the calls in order to make sales," and "needs to be more assertive in managing."

In August, 1996, Rodney counseled Petitioner concerning the failure of her branch to drop off checks at the processing center, as each branch was required to do daily. The Carter Road Branch missed its daily drop on several occasions, resulting in lost income to the branch and the Bank. In one instance, $250,000 in checks was left in the branch over the weekend. Rodney warned Petitioner that this was unacceptable, and that it was Petitioner's responsibility to make sure the drops were completed daily.

By August, 1996, Petitioner was still behind other branch managers in acclimating to the new sales environment, and she had demonstrated she was unable to handle the dual responsibilities of sales and branch management. Rodney and Sims were receiving pressure from upper management, including Jack Shipman to make the branch perform at a higher level, and Rodney and Sims were particularly concerned because the Bank was building a new expensive Carter Road Branch down the street. With a new, costly building, the branch would have even greater performance expectations. Rodney and Sims believed that Petitioner would not be able to meet those expectations since she was struggling with the expectations of a smaller branch.

On September 13, 1996, Rodney and Sims met with Petitioner concerning the branch's performance. They noted that the Carter Road Branch was below the average for the region in terms of lending, credit protection, checking totals, and Great Financial Services.[2] Petitioner had

[2] Petitioner attempted to argue to the Sixth Circuit that the Bank changed its reasons for transferring her when it said her branch was below average in sales and then said her branch was below average in achievement of sales goals. The Court of Appeals correctly noted that

(Continued on following page)

not met some goals at all. For example, Petitioner's branch had a total of Ø Great Financial Services Manager Sales, where there was a minimum goal of $50,888.00 and attained only 66.4% of its goal for Great Financial Services Fee Income. In addition, although Petitioner was meeting and/or exceeding some goals, she was doing so to a much lesser extent than those met and exceeded by other branch managers who had higher goals. Of the eleven branches in the Western Kentucky Region, all but three branches substantially increased their retail deposits in 1996 because the Bank changed the way it calculated deposits, adding IRA deposits (previously excluded) to the total. Several branches increased their deposits by 30-40% compared to the Carter Road Branch which only increased its deposits by 19.5%. Similarly, although Petitioner was meeting her total goal for equity loans (which included personal lines of credit) and installment loans for the first three quarters, she was one of the lowest achievers in terms of goal percentage achieved in the entire Western Kentucky Region for that period of time and Petitioner failed to meet her monthly goals in both equity loans and installment loans for five of the nine months she was branch manager in 1996. Most other branches in the Western Kentucky Region met and exceeded their goals for equity loans and installment loans to a much greater extent than did Petitioner.

Rodney and Sims advised Petitioner that the below average numbers could not continue, and that the branch's

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these statements are not contradictory (in fact, Petitioner does not dispute that both statements are true) and amount to the same thing, Petitioner was not fit to manage the Carter Road Branch as its operations expanded based on past poor performance. (Petition p. 11a)

goals were being raised for the remainder of the year and would go up again in 1997 because of the new branch building and higher expectations of the branch's sales capabilities. Instead of accepting the additional responsibility, Petitioner told Rodney and Sims that ***if*** she had more staff, she could meet the goals.[3] Rodney and Sims told Petitioner they would be monitoring her performance weekly to determine whether she could meet these new expectations.

Sims further reviewed the branch over the next two weeks and determined, in his opinion, that the staff did not have a clear definition of duties, the filing system was in disarray, work areas were unorganized, and too many responsibilities were being delegated to the Head Teller. He attributed this to Petitioner's poor management style. Petitioner now falsely claims that she has denied all of these allegations; in fact, she admitted in her deposition that the branch was behind in filing.

On September 27, 1996, Rodney and Sims transferred Petitioner to the position of relief manager effective October 1, 1996. Rodney and Sims made this decision because, after giving Petitioner ample opportunity (more than one and one-half years) her overall performance and

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[3] Petitioner attempts to claim that her alleged staffing issues somehow established that her transfer was motivated by her race. The evidence established that all branches were short-staffed. Petitioner testified in her deposition that she was short-handed in the summer of 1996 because her branch suddenly lost one employee to death and another employee quit. Obviously, the Bank did not create Petitioner's staffing problem, and the fact that staffing increased after this unexpected decrease (and after the branch was moved to a larger location) is neither surprising nor "evidence" that her race played a role in her transfer.

that of the Carter Road Branch was not meeting the Bank's expectations. Rodney and Sims were convinced that with the added pressure and increased goals for the expanding branch, they could no longer wait for Petitioner to improve her performance as a branch manager. The goals for the Carter Road Branch had been lower than most other branches but Petitioner still failed to attain and/or exceed the goals to the same extent as the other branches attained and exceeded their higher goals. They were concerned that Petitioner would not be able to meet the greater expectations of the new branch. In response, Petitioner accused Rodney and Sims of trying to "get rid of all of the Great Financial people and promote the Cardinal employees." Petitioner admitted she believed this to be true because she believed employees who had come from Cardinal received preferential treatment.

Petitioner was not the only branch manager who was transferred to a different position. Two (2) white branch managers (Judy Thompson and Karen Easton) who reported to Dean Rodney were also transferred to different positions in 1995 and 1996 because of their failure to adjust to the new sales culture. Judy Thompson had difficulty adjusting to the new sales culture, particularly to making sales calls. As a result, she was transferred to the position of assistant manager at a reduction in pay. Karen Easton also had difficulty adjusting to the new sales culture, and was transferred to the position of teller, also with a reduction in salary. Petitioner actually received more favorable treatment than these white employees because she was given a lateral transfer to the position of relief manager, which enabled her to fill in as manager at branches throughout the Owensboro area without a reduction in pay. She remained eligible for an incentive

package, kept her status as a manager, retained the same salary, and still reported to Rodney; whereas, the white employees received a reduction in pay and transferred to the position of assistant manager or to the position of teller.

Despite the fact that no one at the Bank had ever said anything negative about Petitioner's sex or her race, that the decisionmakers in this case, Dean Rodney and Mark Sims had a history of placing women in the position of branch manager, and that at least fifty percent (50%) of the branch managers in the Owensboro market were female, Petitioner filed this action alleging race and sex discrimination.[4] Petitioner's only "evidence," and only reason to believe, that her race or sex was a factor in her transfer was that a white male subsequently took over the position of branch manager at Carter Road. Chuck Young, had an established background in banking and sales with a competitor – Fifth Third Bank. At the time, Fifth Third had a more established sales culture and Young had excelled in that environment with $1 million in installment lending during the first three quarters of 1996. Also, unlike Petitioner, Young had a bachelors degree from Centre College and had completed coursework toward a masters degree from the University of Louisville. He was highly qualified for the position and with his track record and past performance, Rodney and Sims believed he could succeed at the new Carter Road Branch.

[4] Petitioner has since abandoned her sex discrimination claim.

REASONS FOR DENYING THE WRIT

As Petitioner herself acknowledges: "This case involves a single Title VII Plaintiff in which the lower courts' decisions were based upon fact-intensive judgments about the evidentiary record." (Petition, p. 26) The Sixth Circuit's decision affirming summary judgment for Respondent because Petitioner's "evidence" was insufficient to establish race discrimination does not present an important question warranting this Court's review. The district court judge and the three judges for the United States Court of Appeals for the Sixth Circuit are all in agreement that summary judgment is appropriate. Petitioner cites no compelling reason for this Court to grant her writ. The Sixth Circuit's decision does not conflict with the decision of another court of appeals on an important matter and does not decide an important federal question. Petitioner does not establish that a review of the Sixth Circuit's decision would have any application outside of this individual case.

The Sixth Circuit's decision rests on the principles enunciated in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-49 (2000). Its fact-based determination that Petitioner has not presented sufficient evidence of discrimination under *Reeves* does not present an important issue for this Court's review. The Sixth Circuit's analysis of Petitioner's "evidence" is as follows:

> . . . [S]everal undisputed facts support the proposition that Miller was not performing adequately so as to continue as manager of the Carter Road branch. First, Miller did not complete any personal branch manager sales during 1996, much less meet her personal branch manager sales goals that year. Second, Miller's sales calls continued to

> be ineffective, as evidenced by an exchange between Miller and Sims in February of 1996 during which Miller informed Sims that she had not opened any accounts as a result of her sales calls and that she was sometimes speaking only to receptionists or secretaries, which was not the proper way to make sales calls. Third, at least until August of 1996, the Carter Road branch was not consistently dropping off deposited checks at Great Financial's processing center each day in a timely manner as it was required to do, a failure admitted by Miller that resulted in lost revenue for both her branch and the bank. These facts amply support Firstar's proffered justification.
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> * * *
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> . . . Miller argues that her demotion was not motivated by Firstar's belief that she was not fit to manage the Carter Road branch as it expanded but was actually motivated by a desire to make room for someone else – Young.
>
> While this evidence suggests Great Financial was less than forthright with Miller about her status as branch manager and that the company took steps to replace Miller while at the same time representing to her that she could retain her position if she improved her performance, these actions do not tend to show that Miller's demotion was more likely motivated by discriminatory animus than by Firstar's proffered justification.

Miller v. Firstar Bank, N.A., 111 Fed. Appx. 796, 2004 U.S. App. LEXIS 18967 (6th Cir. 2004) (Petition, pp. 12a-14a).

Petitioner's petition makes clear that it seeks to have this Court review the Sixth Circuit's evaluation of sufficiency

of the evidence rather than any general legal principle. The review should be denied. The Sixth Circuit properly stated the law under *Reeves*. Petitioner claims that the Circuit Court violated the precepts in *Reeves*, but does not explain what precepts were allegedly violated.[5] That Petitioner disagrees with the decision of the Circuit Court and believes it misapplied the law does not warrant review by this Court. "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10.

Furthermore, the Sixth Circuit's ruling is plainly correct. Petitioner's undisputed failings in various areas of her position, regardless of whether she was successful in other areas, supports her transfer to a different position where she could be more successful. Even if the Bank concealed its plans for the branch from Petitioner until it was ready to make the change, the critical issue is whether the reason behind the plans was discriminatory because of race. There is no evidence to support such a finding. All of the judges who have reviewed this case have determined that Petitioner did not present sufficient

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[5] Petitioner only partially cites the decision of this Court in *Reeves*. Although Petitioner correctly notes that this Court stated in *Reeves* that a plaintiff's prima facie case combined with sufficient evidence to find that an employer's asserted justification is false *may* permit the trier of fact to conclude that the employer unlawfully discriminated, this Court went on to state that such a showing by the plaintiff will not always be adequate. "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148.

evidence to support her claims. The petition should be denied for this reason as well.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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